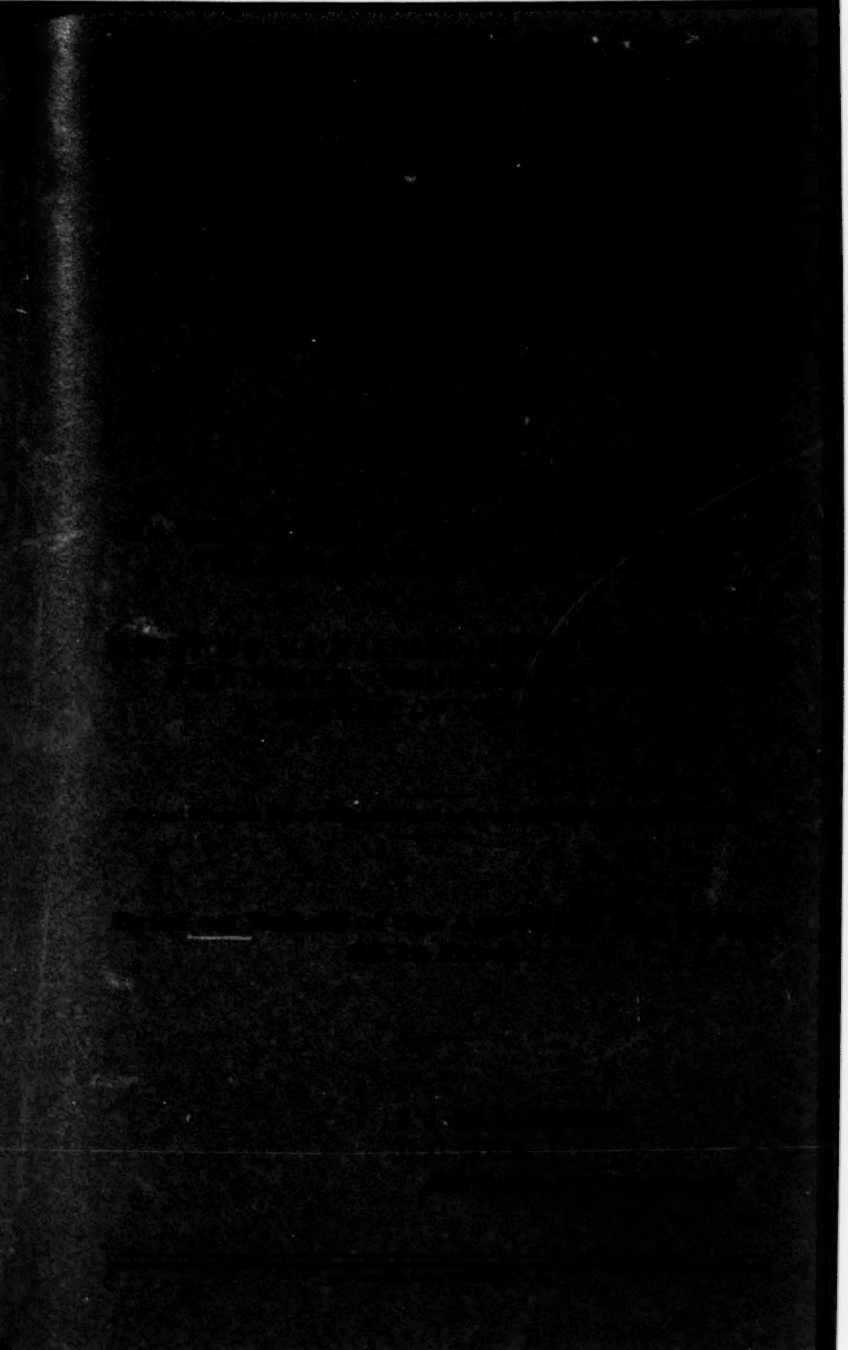

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 16.

THE METROPOLITAN RAILROAD COMPANY, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

Appeal From or Error to the Court of Appeals of the District of Columbia.

Brief on Behalf of the Appellant and Plaintiff in Error.

Statement.

This is an appeal from, and writ of error to, the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia, confirming the verdict of a special jury of seven, making a special assessment against the appellant in the sum of twenty-five thousand dollars ($25,000) for supposed benefits to accrue to it from being required to extend its line of road.

The proceeding which resulted in such assessment was provided for by act of Congress approved June 6, 1900. The parts whereof material to the questions presented by the record in this cause, are as follows: (31 Stat. p. 668)

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Metropolitan Railroad Company of the District of Columbia be, and the same is hereby, authorized and required to extend by double tracks the lines of its underground electric railroad from its present terminus at the intersection of Eighteenth street and Columbia road easterly along Columbia road to the present Sixteenth street northwest, thence north along Sixteenth street to Park street: *Provided*, That no cars shall be switched in the streets after the expiration of two years from the passage of this act.
>
> "SEC. 2. That before such extension shall be constructed Columbia road shall be widened to a width of one hundred feet, the present Sixteenth street shall be widened to a width of eighty-five feet from Columbia road to Park street, and in such widening the building restriction line on the eastern side of said street shall be taken as far as practicable to form the eastern side of said street when widened; and also sufficient land shall be acquired at the northwesterly corner of Columbia road and Sixteenth street so as to allow the street railway tracks to be laid wholly without the roadway of Sixteenth street as extended according to the highway extension plans; all in accordance with plans to be prepared by the Commissioners of the District of Columbia; and the said Commissioners shall institute in the Supreme Court of the District of Columbia, sitting as a district court, by petition, particularly describing the lands to be taken, a proceeding in rem to condemn the land that may be necessary for the extension of Columbia road and the present Sixteenth street as herein provided, with a width of one hundred feet: *Provided*, That the said Commissioners are authorized and empowered to locate the lines

of the railroad of said company within the area so to be acquired as aforesaid: *And provided further*, That the operation of the cars of the Metropolitan railroad within the capitol grounds shall be under the control of the architect of the capitol: *And provided further*, That no tracks shall be laid on any portion of the roadway of Sixteenth street as extended according to the highway extension plans.

"SEC. 3. That the extensions of the lines of the Metropolitan Railroad Company herein provided for shall be completed and put in operation within one year from the date of the widening of said highways as herein provided, and said company shall deposit with the collector of taxes of the District of Columbia such sums as are necessary to pay the cost of inspection of said work.

"SEC. 4. That of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia road and the present Sixteenth street, as herein provided, such proportional amounts thereof as the jury hereinafter provided shall determine shall be assessed by said jury as benefits, and to the extent of such benefits, against respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected, and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia road as aforesaid: *Provided*, That if the aggregate amount of the benefits to be assessed against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened,

and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited, as determined by said jury pursuant to the provisions hereof, is less than one-half of the amount of the damages awarded for and in respect of the land condemned, the Commissioners of the District of Columbia may, in their discretion, within thirty days after the filing of said award, reject the award and assessment of said jury, and all proceedings hereunder shall be null and void."

The fifth section provides that notice of the proceeding shall be given to all persons interested.

The first part of the sixth section provides for impanneling the jury of condemnation, prescribes the oath to be administered to its members, and then proceeds:

"And after said jury shall have been organized and shall have viewed the premises, said jury shall proceed, in the presence of the court, if the court shall so direct, or otherwise, as the court may direct, to hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having an interest in the proceedings for the extension of said street. When the hearing is concluded the jury, or a majority of them, shall return to said court, in writing, its verdict of the amount to be found due and payable as damages sustained by reason of the extension of said street under the provisions hereof, and of the pieces or parcels of land benefited by such extension and the amount of the assessment for such benefits against the same."

The seventh section provides that benefits shall not be set off against damages.

The eighth section is as follows:

"Sec. 8. That the court shall have power to hear and determine any objections which may be filed to

> said verdict or award, and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable, and in such event a new jury shall be summoned, who shall proceed to assess the damages or benefits, as the case may be, in respect of the land as to which the verdict may be vacated, as in the case of the first jury: Provided, That if vacated in part, the residue of the verdict and award as to the land condemned or assessed shall not be affected thereby: And provided further, That the exceptions or objections to the verdict and award shall be filed within thirty days after the return of such verdict and award."

The ninth section provides for the payment of the damages to the parties entitled.

The first part of the tenth section is as follows:

> "That when confirmed by the court the several assessments herein provided to be made shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in four equal annual instalments, with interest at the rate of four per centum per annum from the date of confirmation until paid."

The residue of the tenth section relates to amendments.

The eleventh and twelfth sections relate to the costs of the proceeding.

The thirteenth section provides that an appeal by one party shall not stay proceedings as to others.

The fourteenth section reserves the right to alter, amend, or repeal.

Pursuant to said act the appellees filed their petition in the Supreme Court of the District of Columbia on the 12th day of July, 1900 (Rec. pp. 1 to 3 inc.).

Notice having been given as required by the act, and a jury properly summoned by the marshal, the trial court, on the 2d day of August, 1900, organized the jury and entered

an order requiring them to view the premises, and thereafter, out of the presence of the court, and from time to time as they might determine, to hear and receive such evidence as might be offered or submitted to them on behalf of the District of Columbia, or any person or persons having any interest in the said proceedings, and at the conclusion of their hearings to return their verdict, in writing, to the court (Rec. p. 4).

On the 20th of August, 1900, the appellant filed its answer to said petition, alleging that it was not the owner of any real estate or other property whatsoever, either abutting upon or adjacent to either of the streets to be widened and improved, and it had not requested the passage of said act authorizing and requiring it to extend its line; that the same was unconstitutional, illegal, and void as to it; that it would not be benefited by such extension of its line and improvement of the streets; that any and all supposed benefits to it therefrom were speculative, and that the said act of Congress, and the proceedings in pursuance thereof, were wholly nugatory and void as to it, and prayed that the court would instruct the jury that no part of the cost of any lands which might be condemned in said proceeding could be assessed against it (Rec. p. 5).

The jury proceeded to take evidence in accordance with the order of the court, and on the 24th of August, 1900, took the deposition of James B. Lackey, which was offered on behalf of the railroad company, and his deposition was the only evidence taken or submitted to the jury upon the question of benefits to the railroad company. Mr. Lackey is the secretary of the appellant, and it appears by his deposition that he has had considerable experience in the construction and operation of the underground electric system for the propulsion of cars in the city of Washington, and knows the cost thereof; that the length of the extension of the appellant's road required by said act is about forty-seven hundred feet; that the construction of the road for that dis-

tance would cost about one hundred and seventeen thousand dollars ($117,000); that to operate the said extension, after its construction, in connection with the other parts of the road would increase the operating expenses about eight thousand dollars ($8,000) per annum; that this sum added to the interest upon the one hundred and seventeen thousand dollars ($117,000), cost of construction, would increase the annual fixed charges of the company about fourteen thousand dollars ($14,000) per annum; that in order to cover this additional expense at the rate of fare fixed by law would require about nine hundred (900) additional passengers per day, and that the extension would have no tendency to increase the number of passengers in the immediate future to any considerable extent, and that it would be impossible to tell how soon, if at all, there would be an increase of receipts from the extension sufficient to pay the increased expenses. He also testified that the company made no effort to have the law passed, but opposed it, on the ground that the time had not arrived for such extension (see Lackey's deposition, pp. 14 to 20, inclusive). Neither the District of Columbia, nor any of the property holders, offered any evidence before the jury upon the question of the expense to the appellant in extending its road and operating the extension, or upon the question of benefits, if any, to result to it therefrom.

On the 5th day of September, 1900, before the jury had returned its verdict, counsel for the appellant prayed the court to grant the following instructions:

> "1a. The jury is instructed that no benefits can be assessed by it against the Metropolitan Railroad Company as such, but that it can assess benefits only against such property of said company, if any, as it shall find will be benefited by the proposed widening and extension of Sixteenth St. and Columbia road, and to the extent, if any, to which it shall find such property will be benefited by such widening and extension, just as in the case of the property of

other owners which it may find will be so benefited.

"Refused, and exception by Mr. Darlington.

"1b. The jury is instructed that under the evidence in this case it can make no assessment of benefits against the Metropolitan Railroad Company.

"Refused, and exception by Darlington.

"2. The jury is instructed that it can assess such benefits only against the Metropolitan Railroad Company, if any, as it has been shown by the evidence in the case will result to said company from the extension of Columbia road and present Sixteenth street, as provided in the act of Congress approved June 6th, 1900.

"Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property owners.

"3. The jury is instructed that it is not required to assess any part of the amount which it shall award as damages for and in respect of the land condemned in these proceedings against the Metropolitan Railroad Company, and that it is its duty not to do so unless it is satisfied by a fair preponderance of the evidence that the said company will be specially benefited by the proposed extension of Columbia road and the present Sixteenth street, and, in case it shall be so satisfied, it is its duty to assess against the said railroad company only such sum as shall be a fair and reasonable measure of such benefits.

"Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property owners.

"4. In determining the question whether or not said railroad company will be benefited by the said extension, and the extent of such benefit, if any, the jury should consider the cost to which said company will be put in extending its lines from its present terminus, as provided in the act of June 6, 1900, and the increased cost of operating its said lines, as shown by the testimony in connection with such evidence in the case as may tend to establish the fact and amount of such benefits to it.

"Granted, and exception taken by D. C. and also by G. F. Williams on behalf of certain property owners."

The court declined to grant the instructions marked 1a and 1b, and separate exceptions were taken to its action in that regard by appellant. Instructions numbered 2, 3, and 4 were granted, and exception was taken thereto by the District and some of the property owners."

On the 27th of September, 1900, the jury returned its verdict, in writing, into court, by which it awarded as damages to the owners of the land to be taken in widening the streets the sum of one hundred and eighty-one thousand eight hundred and fifty-eight dollars ($181,858), and assessed as benefits against the land abutting on said streets that would be benefited thereby the sum of ninety thousand nine hundred and twenty-nine dollars ($90,929) as benefits, and against the appellant the sum of twenty-five thousand dollars ($25,000) as benefits (Rec. pp. 8 and 9).

On the 29th of October, 1900, the appellant filed its exceptions to the finding of said jury, as follows:

> "1. That the said finding, assessment, and award are without evidence to support the same.
>
> "2. That the said finding, assessment, and award are contrary to the evidence.
>
> "3. That the said finding, assessment, and award are contrary to the weight of the evidence.
>
> "4. For errors of law in the instructions given and refused by the court to the jury over the objection and exception of the Metropolitan Railroad Company before the said finding, assessment, and award were made, as shown by the record of the said cause" (Rec. p. 10).

On the 28th day of November, 1900, the appellant, in order to enable the court to pass upon its exception that the verdict of the jury was without evidence to support it, the testimony having been taken out of the presence of the judge, filed its petition, supported by the affidavits of its secretary, of the stenographer who reported the testimony, and of a member of the bar who had been present at all the hearings before the jury, setting out the fact that the only

witness upon the question of benefits to the appellant was James B. Lackey, that the transcript of his testimony annexed to the petition was a full, complete, and correct transcript thereof, and praying that the same might be filed as a part of the record, the same being essential to the determination of its exceptions, which petition was accordingly filed by order of the court (Rec. pp. 12, 13).

On the 9th of July, 1901, after argument of said exceptions, the Supreme Court of the District passed its final decree, confirming said verdict, award, and assessment, from which the appellant appealed to the Court of Appeals of the District (Rec. p. 21).

The case was argued and submitted to the last mentioned court on May 16, 1902 (Rec. p. 25), and on October 15, 1902, that court rendered its opinion and entered its final decree in the cause, affirming the decree of the Supreme Court of the District (Rec. pp. 25 to 35, both inclusive).

Thereupon the appellant appealed to this court and also sued out a writ of error from this court to remove the cause here (Rec. pp. 36 and 37).

Assignment of Errors.

The court below erred in sustaining the trial court:

1st. *In refusing to set aside the assessment because not supported by the evidence, and because contrary to the same and the weight thereof.*

2d. *In refusing to instruct the jury that no assessment could be made against it as a corporation, but only against such of its property, if any, as might be benefited.*

3d. *In refusing to instruct the jury that no assessment of benefits could be made against appellant.*

Questions to be Argued.

The foregoing statement and assignment of errors give rise to the following propositions to be considered:

1st. *The evidence fails to show any benefit to appellant, but*

rather a damage, and the enforcement of the assessment would be the taking of private property for public use without compensation.

2d. *The proceeding as conducted was not due process of law, and the collection of said assessment would be depriving the appellant of its property without due process of law.*

3d. *No personal liability can be imposed by special assessment, but only a lien upon tangible property benefited by the improvement.*

4th. *Congress had no power without the assent of the appellant to require it to extend its road.*

ARGUMENT.

A preliminary question is raised by an objection which was urged below, though not referred to in the opinion of the court—namely, that in proceedings like the present, in which the evidence is taken before a jury, out of the presence of the court, it can not be made a part of the record, and, accordingly, the proposition here contended for, that the verdict is without evidence to support it, is eliminated and can not be submitted to or passed upon by the court.

The right of eminent domain is not a right in equity, nor a creature of statute, but a common law right; and a proceeding like that in the case at bar, to take land for public use by condemnation, is a "suit."

Kohl *vs.* United States, 91 U. S. 367, 375.
Searl *vs.* School District, 124 U. S.197, 199.
Chappel *vs.* United States, 160, 499, 513.

If, therefore, the above objection is maintainable, such suits constitute an exception to the constitutional provision, and, in them, persons may be deprived of their property by arbitrary verdicts of juries, wholly unsupported by evidence.

> "A finding of fact, without evidence to support it, has always been regarded as a ruling upon a question of law, and, if excepted to, presented a legal question reviewable in this court."
>
> Halpine *vs.* Phœnix Insurance Company, 188 N. Y. 165, 170.
>
> Daniels *vs.* Smith, 130 N. Y. 696.

The authorities relied upon below in support of the objection, were—

> Lessor of Fisher *vs.* Cockerell, 5 Pet. 248, 253–4.
>
> Suydam *vs.* Williamson et al., 20 How. 427.
>
> Railroad Company *vs.* Sixth Presbyterian Church, 91 U. S. 127, 130.

The first of these cases was error in ejectment, in which it was sought to make a certain document a part of the record for consideration in the appellate court by a certificate of the clerk that they had been read in evidence at the trial. The court held that the certificate of the clerk was unauthorized, and that, in cases at common law—

> "the course of the court has been uniform not to consider any paper as part of the record which is not made so by the pleadings, or by some opinion of the court referring to it. . . . The appellate court can not know what evidence was given to the jury, unless it be spread on the record in proper legal manner."

Suydam *vs.* Williamson was, also, error in ejectment, tried in the usual way before a jury in the presence of the court, and in which, accordingly, there was no obstacle to presenting the exceptions of the losing party in the ordinary manner. And the court, evidently having in mind trials of the ordinary character, in which those methods are available, after mentioning bills of exceptions, special verdicts, demurrers to the evidence, oyer, agreed cases and the like, de-

clares: "There are no others which can be recognized by this court in cases where the proceedings are required to be in the course of the common law."

In Railroad Company *vs.* The Sixth Presbyterian Church, the hearing had been in a manner somewhat analogous to that in the present case, except that it was had before a jury, presided over by a justice of the peace, whose rulings upon the admission of evidence it was desired to have the court review, not upon a bill of exceptions, or other proceedings to which the justice or the court was a party, but by mere ex parte affidavits, purporting to state the rulings objected to, and filed on behalf of the railroad company without the concurence or action of the court. And it was upon a case of this character, presenting no difficulty or obstacle to making the exceptions a part of the record in the usual way, that this court declared an agreed statement of facts, a bill of exceptions, a special verdict, or a demurrer to the evidence the only ways in which matters of parol evidence can be made a part of the record, "so as to become re-examinable in a court of errors."

> "Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in cases of refusal to comply with such request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment or error (citations). Errors apparent in the record itself are open to revision, whether the error be made to appear by bills of exceptions or in any other legal manner."

And the court continues:

> "Doubtless other modes may be devised of accomplishing a revision of the legal questions in a case like the present; but the court does not find it necessary to pursue the inquiry, as all the court intends to decide is that the affidavits in the transcript are not a part of the record, and that in such a case an assignment of errors, such as the one exhibited in this case, so far as the same depends on the affidavits, presents no question for re-examination by this court."

In this last case, therefore, the court expressly recognizes the fact that, in cases like the one then, and now, before it, other modes may be devised of accomplishing a revision of the legal questions presented, and holds only that, in such a case, affidavits such as were there offered, namely, affidavits presenting no other ground for admission into the record than the fact that one of the parties had filed them in the clerk's office, could not be considered.

In Russell vs. Ely, 2 Black 575, 580, which was also a question of ejectment, the court say:

> "What purports to be the entire deposition of Baker is sent up by the clerk of the district court, and is printed in the record before us, and, if properly before us, might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless encumbrance of the transcript, and an expense to the litigating parties."

It is respectfully submitted that the facts of the present case exclude it from the rulings of the court in those above cited, and at the same time bring it within the principles there laid down. Here, the petition, with its annexed transcript of the deposition and the affidavits showing it to be a full, complete, and true transcript of all the testimony before the jury on the question of benefits to the railroad, and filed in the cause by the court's order, is in effect a part

of the pleadings, and at all events is commonly a part of the record of the case. In the lower court, though the fact does not and could not appear of record, the evidence was discussed by the learned justice who confirmed the award on the ground that, under it and in connection with their "view," the jury had evidence sufficient to sustain their benefit assessment against the appellant; and, in the Court of Appeals, the opinion declares that the jury "heard such evidence as either party thought proper to offer for their consideration," the only evidence of which fact being the deposition and affidavits which, it is objected, are no part of the record.

We respectfully submit that, especially when considered in the light of the circumstances of the case, and of the impossibility of pursuing the course usually followed when the evidence is taken in the presence of the court, the exception of the appellant, with its petition setting forth the whole of the testimony upon the question in issue, certified in the only manner in which certification was possible, under an order of the court signed by the presiding justice, and uncontroverted by the opposing party, is in every legal and essential particular a bill of exceptions.

In Rosenthal *vs.* Ehrlicher *et al.*, 154 Pa. St. 590, the court say:

> "When the stenographer's notes are completed in this manner they present a faithful transcript of all that occurred on the trial, and they show in their proper connection all that formerly went to make up a bill of exceptions. They take the place of the minutes of the trial formerly kept by the judge or under his direction, and the bills of exceptions formerly written out at the trial. These notes, however, do not become a part of the record because the stenographer certifies as to their accuracy, but they are made a part of the record by order of the court that they be written out and filed. When so filed they place upon the record a complete bill of exceptions upon every question on which an exception

> was in fact taken. Nothing could be simpler in practice. Nothing could be fairer to the judge or to the party litigant. The entire trial is literally photographed upon the record. Under such circumstances it would be a waste of time and of legal formalities to settle a bill of exceptions under the old practice. The bill is already settled and is on the record when the stenographer's notes are filed under the direction of the court, and they may be copied therefrom and printed without further ceremony by an appellant."

In Sargeant *vs.* the Bank of Indiana, 12 How. 371, 384, the court say:

> "The mere fact of a paper being found among the files of a cause does not of itself constitute it a part of the record of the cause. In order to render it a part of the record it should form some part of the pleadings in the cause, or be brought under and engrafted upon the action of the court by some motion from the parties."

This is precisely what was done in the case now before the court.

In England *vs.* Gebhardt, 112 U. S. 502, 505, the court say:

> "The mere fact that a paper is found among the files of a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause it must be put into the record by some action of the court (citations.) This may be generally by bill of exceptions, or something which is equivalent."

In Bronson *vs.* Shulten, 104 U. S. 410, 413, the fact that an order referred to a motion and annexed affidavits was held to be sufficient to have them considered as part of the record. In the case at bar the deposition is made a part of the record by an order of the court which expressly directs it to be filed in the cause.

Not only, it is submitted, is the petition and annexed deposition a part of the record, but, under the decisions of this court, it is a bill of exceptions, or entitled to be so considered, under the facts and circumstances of this case.

In Parsons *vs.* Armor et al., 3 Pet. 413, 424, in which case the obstacle to a formal bill of exceptions was no greater than in the case at bar, the court held that, under its circumstances, although the writ did not bring up the mere statement of facts but a mass of testimony, it might, under the circumstances of the case, be treated as a bill of exceptions.

And in Hyde et al. *vs.* Booraem et al., 16 Pet. 169, 176, which was also error, the record in lieu of a formal bill of exceptions contained the whole evidence at large, which this court held might be treated as a bill of exceptions, not to determine whether the court rightly interpreted the evidence or drew right conclusions from it, but, as in the case at bar, to determine whether, upon the whole evidence, there being no conflict in it, the judgment can be maintained; or, in other words, whether the evidence was sufficient in law to support the verdict.

In Morse *vs.* Evans, 6 How. Pr. 445, in which case the trial judge had died before the bill of exceptions had been settled, it is held that the case might be presented upon affidavits.

In Insurance Co. *vs.* Boon, 95 U. S. 117, 126, the court said:

> "It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time. . . . Ordinarily, there must be something to amend by, but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was."

In no case could the truth "as to what was actually done

at the time" be more satisfactorily shown than in the case at bar.

Assuming, then, that the preliminary objection in question is not maintainable, we proceed to the merits of the case.

FIRST.

The Evidence and Surrounding Circumstances Not Only Fail to Show That the Appellant Would be Benefited by the Improvement in Question, But Shows Positively That It Would be Damaged Thereby.

The question of whether property may be charged with an assessment which is not actually, but only theoretically, benefited by a local improvement, or whether it may be thereby charged in excess of actual benefits, does not arise in this case. There has been no determination by the legislature that any property, or the railroad company, would be benefited by the improvement. The question of whether any benefits would accrue is submitted by the act to the judgment of the court and jury.

The language of the act is that, of the amount found to be due and awarded as damages for the land condemned—

> "such proportional amounts thereof as the jury hereinafter provided shall determine, shall be assessed by said jury as benefits and to the extent of such benefits against respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected, and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land, the jury

> shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia road as aforesaid,"

showing the clear intent of Congress that no assessment should be made in excess of the autual benefits to accrue.

The case of Norwood *vs.* Baker, 172 U. S. 269, had been then recently decided by this court, and the act of Congress in question adopted and followed the principle therein announced.

There can be no contention but that the only evidence produced before the jury not only proved conclusively that the appellant would not be benefited by the improvement, but that, if it extended its road in accordance with the requirement of the statute, it would actually be damaged. There was no evidence introduced to contradict that given by Mr. Lackey, who was a competent and well-informed witness. It is contended on behalf of the District that the jury had the right to view the premises, and to take into consideration the situation and surrounding circumstances. It is not denied that they might properly do that in connection with other evidence. In a case where the question is as to benefits accruing to particular lands or parcels of real estate from an improvement, such view may be of great service to the jury in reaching a correct conclusion, but, even in such cases, the jury is not authorized, and will not be permitted by the court, to let its own view of the premises outweigh controlling evidence in the case. The jury has no right to ignore the sworn evidence and base their conclusions upon the view of the premises. It is only where the evidence conflicts that the jury may use its view of the premises to settle the controversy.

Thompson on Trials, sec. 895.
Lewis on Eminent Domain, sec. 425.
Shoemaker *vs.* United States, 147 U. S. 303, 305–306.

Washburn *vs.* Milwaukee, etc., R. R. Co., 59 Wisc. 364
Atchison, Topeka, etc., R. R. *vs.* Schneider, 127 Ill. 144.
Taflin *vs.* Chicago, etc., R. R., 33 Fed. R. 415.
Grand Rapids *vs.* Perkins, 78 Mich. 93.
Kansas City *vs.* Baird, 98 Mo. 215.
Munkevitz *vs.* C. M. & St. P. R. R., 84 Wis. 403.
Fowler *vs.* R. R. Co., 132 Pa. St. 524.
Clase *vs.* Sawn, 27 Iowa, 503.
7 Encl. Pl. & Pr., p. 581, and authorities cited.

In A. T. & S. F. R. R. Co. *vs.* Schneider, 127 Ill. 144, the court, in speaking of the effect of a view of the premises as evidence, said:

> "The verdict of the jury is not only contrary to the weight of the testimony, but manifestly against all the evidence, and this is not denied or controverted by counsel for appellees. It seems, however, that it was sustained below, on the theory that the jury might legally base its report as to the amount of compensation to be paid, on their personal examination of the premises, without regard to the testimony of witnesses, and this view is now urged in support of the judgment below, and is thought to be sustained by decisions of this court. While it is true that we have frequently held that the personal examination by the jury in such cases is in the nature of evidence, and is to be considered by them in connection with all other evidence in the case, and that an assessment will not be set aside merely because it may differ in amount from the preponderance of the evidence appearing in the record, it has not been held by this or any other court, so far as we are aware, that all the evidence may be ignored, and the amount fixed directly contrary thereto" (127 Ill. 149).

In the case in the 33 Fed. Rep. 415, Judge Dyer, in charging the jury, said:

> "You have been permitted to view the premises in question. The object of this view was to acquaint

you with the physical situation, condition, and surroundings of the premises, and to enable you better to understand the evidence on the trial. The knowledge which you acquired by the view may be used by you in determining the weight of conflicting testimony respecting value and damage, but no further. Your final conclusion must rest on the evidence here adduced" (33 Fed. Rep. 424).

In Flower *vs.* Baltimore, etc., R. R. Co., 132 Pa. St. 524, the question of the effect of a view was the only question in the case, and the court said:

> "There is but a single assignment of error in this case, and that is to the charge of the court. It appears that the jury viewed the premises in dispute, and was subsequently instructed by the court that they could not 'render a verdict upon their own judgment from that view,' but that 'after you have weighed all the evidence, aided by your own view of the premises, you are to give the plaintiff just, full, and fair compensation for the lands this railroad company has taken, and for the injury to the remaining ground if you find it injured.' The learned judge further said: 'You are only permitted to view the land that you may the better understand the testimony. The value of the land you are to ascertain from the witnesses.'
>
> "We see no error in this. The jurors were sworn to render a true verdict according to the evidence. It was never intended that the view of the jury should be substituted for the evidence, and that they should make up their verdict from the view in disregard thereof. The object of the view is, as was correctly said by the learned judge, to enable them the better to understand the testimony; to weigh conflicting testimony, and, thus aided, to arrive at a sound and just conclusion. Controlled by these principles, the view of a jury may often be of great service in such cases. (132 Pa. St. 528).

The other authorities referred to fully sustain the principle announced by the foregoing quotations.

Attention is also called to the fact that, in all these cases, the view was of land, a view of which might be supposed to aid the jury in determining its value, or whether it would be benefited by the improvement. In the present case, so far as the proposed assessment against the railroad company was concerned, there was no question of the value of, or of damage or benefit to, land, but the sole questions for the jury in order to determine whether the extension would benefit the railroad company was how much the extension would cost, and to what extent, if at all, its revenues would be increased thereby. A view of the situation would afford no competent or sufficient basis for deciding these questions.

The only thing they could do in this direction was to take into consideration the surroundings of the proposed extension, and consider it in connection with the evidence before them. When the situation as presented is considered, instead of its militating against the facts as stated by the witness Lackey, it supports and enforces the conclusions to be drawn from his evidence. The extension in question is about nine-tenths of a mile long, through a sparsely settled suburb of the city. The residences west of the extension are very few, and on the east the territory along the line is by no means thickly settled, except in the little village of Mt. Pleasant, and that lies so that at least one-half of the population there is equally accommodated by the Fourteenth street line of cars. Beyond that village, east, north, and west, there is no considerable population to patronize the extension. No point on the extension is much nearer to the Zoological Park than was the terminus of the road at the time of the passage of the act, and the terminus prescribed by the act at Park street is not near enough to Rock Creek Park to induce travel to that point by the defendant road. It can not be denied, upon the evidence in the record, that it would require an increase of about nine hundred passengers daily to pay the increased expenses

caused by such extension, and it is perfectly apparent from the surroundings of the extension that a tenth of that number would not be secured.

In the case of Smyth *vs.* Ames, 169 U. S. 468, it was held by this court that the legislature, in the exercise of its undoubted power to prescribe maximum rates for the carriage of passengers and freights, could not so reduce them as to prevent the railroad companies from receiving a reasonable return upon their investments. It would seem that the same principle should apply here. Assuming that Congress had the power to require the appellant to extend its line, which, however, is not conceded, still the act in question bears upon its face the evidence that Congress did not intend that there should be any assessment against the defendant unless it should in fact be benefited by the extension of its line, and then only to the extent of such benefit.

We think that it may be safely said that the scope of the opinion in Smyth *vs.* Ames, and other like cases decided in this court, furnishes the rule that should have governed the jury and the court below in determining whether the appellant would be benefited by the extension of its line. That rule would be to consider the interest on the cost of the construction, the increased operating expenses, and the probable increase, if any, in the earning capacity to be derived from the extension. This rule was not followed, but ignored by the jury and the courts below. Taking into consideration the situation and the evidence in the record, it appears that the jury ignored it, and fixed an arbitrary sum as benefits to be assessed against appellant based entirely upon speculation and wholly without evidence. They assumed, without any attempt at proof, that in the distant future the appellant might possibly derive a profit from such extension. There is no other ground upon which the assessment could have been based.

That the trial court understood that the jury proceeded

upon this assumption in making its assessment against the railroad company is apparent from the remarks of the learned judge of that court in his opinion confirming the verdict of the jury, which was printed with the brief of the appellee in the court below. The following is quoted from that opinion:

> "It is true this mode of assessing may be an unusual one here with respect to street openings; but it could not be denied that Congress might require a railroad company, and as the price or consideration of a franchise extended to it, to pay a sum, either to be named in the law by Congress itself, or to be ascertained by a jury of inquisition, to be applied to the expense of the improvement" (see appellees' brief, page ——).
>
> . . . . . .
>
> "This great road, with its numerous far-reaching franchises, has thus far been called upon to make no contribution to the public in the form of a price for the franchise given it. Congress authorized, as appears in the statute before us, the enlargement of the powers of the railroad company by giving it a new field of operation, which it is obvious must be beneficial to the railroad, enabling it, as it would do, to land passengers in much nearer proximity to the great Zoological Gardens and to the village of Mt. Pleasant, *and ultimately, by preoccupying the ground, to procure a still further field of operation to the utmost limits of Sixteenth street, when extended*" (see appellees' brief, page ——).
>
> . . . . . .
>
> "It would be most short-sighted if the court should act upon this idea that there would be no considerable increase in the travel *in the future*, taking into consideration the proximity of the Rock Creek Park and the Zoo to the line of the new road, and the increase of travel from the extension of Sixteenth street to Park street, for the accommodation given to the residents in that vicinity who are now compelled to rely upon the Fourteenth street road" (see appellees' brief, p. ——).

These extracts, taken together, indicate that, in the opinion of the trial court, the basis of the assessment was not any advantage to accrue to the railroad company upon the construction of its extension as shown by any evidence in the case, but what it might be anticipated, speculatively, without proof, would accrue to it in the more or less distant future. There is also a suggestion, contrary to the fact, that the company has never paid anything for its franchise, and that, therefore, it would be proper to take this into consideration in determining whether it would be benefited by the proposed extension. If the railroad company had requested the passage of the act and Congress had passed it at its instance it might have imposed such terms as it saw fit, which the company could have accepted or not, but it is respectfully submitted that it would not be competent for Congress, as is shown under the fourth point in this brief, to take from it any of its property under the guise of an amendment to its charter as a consideration for the original grant of its charter; and that still less is it competent to hold that, under this statute imposing upon it liability only in the event that it shall be found to be benefited by the proposed extension and to the extent of that benefit, it may be assessed without any evidence of such benefit, or of its extent, on the ground assumed by the court, without evidence and contrary to the fact, that it had paid nothing for its franchise over its original routes.

Nor, in making special assessments, is it competent to consider speculative and possible future benefits that may accrue from increased business, nor is it proper to take into account possible profits that the improvement of the highway may bring to the owner of the land. The benefit intended is a present and appreciable, not a speculative and remote one.

Norwood *vs.* Baker, 172 U. S. 269.

R. R. Co. *vs.* Tyree, 7 West Va. 698.

Friedenwald *vs.* May & Co., of Baltimore, 74 Md. 126.

Old Colony & Fall River R. R. Co. *vs.* County of Plymouth, 14 Gray, 155.

Boston & Maine R. R. *vs.* County of Middlesex, 1 Allen, 331.

The Eckington and Soldiers' Home Railway Co. *vs.* McDevitt, 191 U. S. 103.

In the case of Norwood *vs.* Baker, this court said:

> "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment" (172 U. S. 279).

Again, in the opinion in that case it is said with approval that Judge Dillon, in his work on Municipal Corporations, has—

> "asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and, since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury" (172 U. S. 288).

In paragraph 247 of Elliott on Roads and Streets (2d ed.), it is said:

> "Remote or merely speculative benefits should not be taken into consideration in any case, but such only as are reasonably certain, and such as add to the value of the owner's estate or property, and not such as enure to him in common with the commu-

> nity at large. It is not competent, as a rule, at least, to take into account possible future benefits that may accrue from the increase of business, nor is it proper to take into account possible profits that the opening of the highway may bring to the owner of the land" (Elliott on Roads and Streets, par. 247).

In R. R. Co. *vs.* Tyree, 7 West Va. 698, the court said:

> "The commissioners should determine what would be a just compensation for the land taken, when taken. They were to decide questions of present value, and not to speculate in respect to the probable consequences of constructing and operating a railroad. These are too uncertain to be made the subject of judicial inquiry" (7 West Va. 698).

Although the question there was the value of land to be taken, and not the benefit to land or property not taken, it would seem that the same rule should equally apply in the latter case.

In the case of Friedenwald *vs.* Mayor, etc., of Baltimore, 74 Md. 126, the Court of Appeals of Maryland used this language:

> "In assessing benefits for opening or widening Baltimore street, the jury can not indulge in vague speculations or conjecture; but must only assess such benefits, if any, as it is, in their opinion, fairly and reasonably apparent that the property of the appellants will receive from the proposed improvement, other than the general benefit to the community" (74 Md. 126).

In the case of the Old Colony & Fall River R. R. Co. *vs.* County of Plymouth, 14 Gray, 155, it was held that the county could not set off against damages to the railroad company for its lands taken for a public road, benefits which might be presumed to accrue to it by increased travel induced by the opening of the county roads.

In the case of Boston & Maine Railroad *vs.* County of

Middlesex, 1 Allen, 331, the same ruling was made, and the court said:

> "The supposed or possible advantage to the petitioners by an anticipated increase of trade and business on their railroad in consequence of the sale, likely to result from the laying out of the highway, of many of the house lots into which the land of Emerson had been divided, was too remote, inconsiderable and contingent to be made the basis of any proper estimate of the damages which they sustained by the laying out of a highway, or of the compensation which ought to be awarded to them" (1 Allen, 331).

The foregoing authorities conclusively show that if any assessment against the railroad company in this case were proper it could only be based upon the probable increase of travel to be reasonably anticipated from the extension in the condition that the surrounding country was at the time of the assessment, and that there could not be taken into consideration any supposed increase of revenues to be derived from the future uncertain establishment of other residences and of other conditions in that locality and beyond it. From the evidence in the record and the surrounding circumstances it could not be assumed with any degree of certainty that the railroad company would receive in the immediate or near future any considerable increase of revenues, certainly not sufficient to keep down the increase in expenses. Any attempt at a determination of that question would be purely speculative.

SECOND.

The Proceeding as Conducted Was Not Due Process of Law.

Assuming that the statute provides for due process of law in the ascertainment of the question of whether benefits would accrue, and, if so, the amount thereof, it has not been

pursued. The statute contemplates that there should be an actual investigation into the facts by the court and jury for the purpose of ascertaining what the effect of the extension would be upon the parties interested. It has been shown that no investigation whatever to determine the question of benefits to the railroad company was entered upon by the jury. It is true they listened to the evidence introduced by the railroad company, but it is quite as evident that they wholly declined to consider it, or to seek any other or further proper information upon the subject. It was, perhaps, not an easy task to perform, but this can not legally justify the "taking" of $25,000 of the company's money wholly without evidence to support such an award.

That due process of law may be denied a party by the improper execution or enforcement of a constitutional statute, as well as by the terms of the law itself, is a familiar doctrine of this court.

In the case of the Chicago, Burlington, etc., R. R. Co. *vs.* Chicago, 166 U. S. 226, this court said:

> "But it must be observed that the prohibitions of the amendment referred to all the instrumentalities of the State, its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State violates the constitutional inhibition; and, as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State" (238 U. S., pp. 235-6).

> "In (the State's) judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form" (166 U. S. 236-7).

In the same opinion the court, quoting from Story on the Constitution, uses the following language:

> "Due process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made, and how the compensation shall be assessed; and, second, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them" (166 U. S. 241).

Due process of law under this statute, if it be valid, required an actual investigation by the jury into the facts necessary to enable them to determine whether the railroad company would be benefited. This was not done, but the jury declined to consider the evidence introduced by the appellant, or any other evidence, but assumed from circumstances coming under their observation from the view made by them, which was not evidence, that appellant would be benefited, and arbitrarily fixed the amount at $25,000. There were no facts or data of any kind before them from which any sum could have been fixed. If the act had required the company to extend its road and to pay $25,000 into the treasury of the District, without requiring any investigation into the question of benefits, it would have been clearly void, as attempting to deprive appellant of its property without due process of law, unless it should be held that Congress possesses the power arbitrarily to require such an extension and payment as the condition of the further exercise of its franchises. The attempt to require such a payment by the verdict of a jury, without such an investigation, under a statute which allows only the assessment of such benefits as the extension shall be found to confer upon the company, is as clearly void, since the jury certainly was without the slightest claim to any arbitrary power in the premises.

THIRD.

No Personal Liability Can be Imposed by a Special Assessment, But Only a Lien Upon Real Estate Benefited.

There is some conflict in the decided cases upon the question under what circumstances and in what manner special assessments may be made upon property supposed to be benefited by a certain local improvement, but there seems to be a unanimity of opinion to the effect that these assessments are not founded upon any idea of revenue, but upon the question of benefits conferred by such improvements upon property situated in the locality thereof. And the only grounds upon which the courts have proceeded in holding that such assessments are not in violation of the constitutional provisions providing for due process of law, and for compensation for property taken for public use, is that the property by the local improvement is increased in value to the extent of the benefits assessed. However unreal this may prove to be in particular cases, the assessment can be sustained upon no other theory. This has been announced in several decisions of this court, and in none more forcibly than in the case of Norwood *vs.* Baber, *supra*, and it is not understood that this principle there announced has ever been departed from by this court in any case.

If this principle be correct, then a special assessment must, in the very nature of things, be made against the property benefited, or some interest therein, and this statute directing such an assessment against appellant is void.

Cooley on Taxation, p. 1288, and notes.
Craw *vs.* Tolono, 96 Ill. 255.
Barber Asphalt Paving Co. *vs.* Watt, 51 La. Ann. 1354.
Meyer *vs.* Covington, 103 Ken. 548.
Taylor *vs.* Palmer, 31 Cal. 240.
Hoover *vs.* The People, 171 Ill. 184.
Green *vs.* Ward, 82 Va. 324.
Asberry *vs.* Roanoke, 91 Va. 562.

While Judge Cooley, in his work on Taxation, speaking upon the subject of special assessments, says that they have been made personal charges in a great number of instances, he also intimates that this may be accounted for upon the ground that they have not always been contested, and gives it as his opinion that the logic of the rule is against the creation of a personal liability by a special assessment. Upon this point he says:

> "In the case of the ordinary taxes no sufficient reason exists why those on lands should not be made a personal charge against the owner, if he is a resident and has the usual opportunity to be heard. The taxes are not so much assessed in respect to the particular lands as the value of the particular lands is taken as a measure of the owner's duty to the State. He is not taxed in consideration of State protection to that particular item of property, but he is taxed for the general protection which the State affords to his life, his liberty, his family and social relations, his property, and the various privileges the law grants to him. If a tax measured by the property should, in its enforcement, take from him more than that property is worth, it would not follow that the State had taken beyond the equivalent rendered. Indeed, the contrary would be almost certainly the fact. It is different in the case of an assessment made upon the basis of benefits. Such an assessment regards nothing but the benefit that is to be conferred upon the particular estate. The levy is made on the supposition that that estate, having received the benefit of a puulic improvement, ought to relieve the public from the expense of making it. In such a case, if the owner can have his land taken from him for a supposed benefit to the land, which, if the land is sold for the tax, is thus conclusively shown he has not received, and he then be held liable for a deficiency in the assessment, the injustice—not to say the tyranny—is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less

extreme in the injury they inflict, are certain to occur.

"The cases are not uncommon in which, on a sale of lands for the payment of a special assessment for a drain or a levee, the whole estate assessed is sold and lost to the owner. Such instances may occur in the case of other improvements. If the statute allows a sale to the highest bidder, the land may be lost to the owner, leaving a balance of the assessment still uncollected. The loss of his lands is incident to a proper exercise of the power of the Government, and, though severe, can give him no ground for complaint. The assessors have perhaps erred in their judgment; but this may occur in any tax proceeding. The estate was lawfully charged with the supposed benefit, and the charge has been enforced. But where and what are the benefits to the individual for which he can be called upon to pay any deficiency after a sale of the estate? Unless the whole legal basis of these assessments has been misunderstood by the courts, it would seem that there are none whatever."

In note 1, on page 1288, from which this quotation is taken, there are cited well considered cases from the States of California, Illinois, Indiana, Kentucky, Iowa, Mississippi, Missouri, New York, Oregon, Pennsylvania, Virginia, and Washington, many of the most important of them having been decided since the text was first written by the distinguished jurist, and many of the opinions follow the text and adopt its reasoning. While it is true that he said at the time he wrote that the weight of authority was in favor of the personal liability rule, considering the number of well considered cases that have since been decided, it may well be stated that the weight now preponderates against the rule. The cases on both sides are referred to in the notes and it will be noticed that those supporting the rule of personal liability are the earlier cases, and in many of them the question does not seem to have been argued. The cases cited in this brief supporting the rule that no personal lia-

bility can be thus created are taken largely from this note, and, as will be seen, are from courts of highest authority. The case of Asberry *vs.* Roanoke, supra, decided by the Court of Appeals of Virginia, is also reported in the 42 L. R. A. 636, and there is a note by the reporter to the effect that the case of Norwood *vs.* Baker is considered as settling the rule against personal liability in this court.

In the case of Dewey *vs.* Des Moines, 173 U. S. 193, this question was argued, but the court declined to decide it, as it was not made a Federal question in that case, but held the personal judgment against the lot owner void on the ground that he was a non-resident of the State of Iowa (although he was personally before the court), and the statute could not impose a personal liability upon him, however it might be as to a resident of the State.

In the case of Davidson *vs.* New Orleans, 96 U. S. 97, there was a personal judgment entered by the Louisiana court against the owner of the property for the amount of the tax, as well as declaring it a lien upon the property, and it was contended that the personal judgment was erroneous. This court said upon that point:

> "And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force—and some highly respectable authorities are cited to support the proposition—that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it" (96 U. S. 106).

But the court declined to decide the point, as it did not involve a Federal question.

In Craw *vs.* Tolono, 96 Ill. 255, the court held the section of a charter of a municipal corporation authorizing a personal judgment against the owner of land for the amount

of a special assessment upon it unconstitutional. In several subsequent cases in that court, referred to in the above mentioned note in Cooley, that case is referred to with approval. In the case of Hoover *vs.* The People, 171 Ill. 184, where a joint judgment against two lots of the same owner was given by the court below for the aggregate of the amounts of special assessments upon them, the Supreme Court of Illinois said:

> "Such a judgment is wholly unauthorized. Judgment for special taxes are *in rem*, and can only lawfully operate against the particular tract or lot of land against which the taxes were assessed,"

and referred to the case of Craw *vs.* Tolono.

In Barber Asphalt Pav. Co. *vs.* Watt, 51 La. Ann. 1354, the court said:

> "Another and more serious contention of the defense is that in no event does any personal liability attach to property holders on account of this local assessment; that whatever liability there may be in this regard it must be confined to the property affected with the lien granted by the statute, and that after exhausting recourse against the property, individual property holders can not be further pursued for any balance remaining over, and other property of theirs, not on the street paved, subjected to its payment.
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> "We hold this to be so, and that the proceeding is one purely *in rem*, acting on the property supposed to be benefited, and none other."

In Meyer *vs.* Covington, 103 Ken. 548, the court said:

> "The appellee instituted this action in the Kenton Circuit Court against the appellant to enforce the collection of more than $700, the amount alleged to be due from him for certain street improvements, and claimed a lien on his property fronting or abutting upon York street, in the city of Covington, due upon the assessment for expenses incident to the widening of York street in said city."
>
> . . . . . .

> "It, however, seems to us that if it be conceded that the city charter was intended to authorize a personal judgment against the appellant for the amount assessed against his abutting property that such provision is unconstitutional and void. It was, therefore, error to render a personal judgment against appellant for any amount."

And this was followed with approval by the same court in the case of Barker *vs.* Southern Con. Co., 47 S. W. Rep. 608.

In Taylor *vs.* Palmer, 31 Cal. 240, a personal judgment was directed to be entered against the owner of the property for the amount of any difference between the amount that might be raised by a sale of the benefited property and the amount of the special assessment. In holding this judgment illegal, the court said:

> "This form of judgment is expressly authorized by the statute (secs. 13 and 17), but we are of opinion that the statute is unconstitutional so far as it affords relief beyond the fund to be realized by a sale of the property assessed."
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> . . . . . .
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> "To avoid any misconception of our meaning, we add that the power of taxation, when exercised either by the legislature immediately or mediately through the intervention of a municipal corporation, must be exercised under and within the limitations of the Constitution—that is to say, it must be exercised upon the *ad valorem* principle, and so as to secure equality and uniformity, except when exercised through a municipal corporation for the purpose of improving its streets. When so exercised, it is withdrawn or excepted from the constitutional limitations so far, and no farther, as to permit its exercise for the purpose and in the mode indicated and measured by the word 'assessment,' as defined and understood in the legislative and judicial history of the country at the time the Constitution was adopted. At that time a personal liability, to be satisfied by the seizure

> of other property than that assessed, property not bordering upon nor in the vicinity of the improved street, and therefore not benefited by the improvement, constituted, so far as we are advised, no part of the mode. The mode then in vogue was made by a definition a part of the Constitution, and became and remains the measure of the power of 'assessment' which may be restricted by the legislature with a view to prevent abuse, but can not be enlarged without overturning the limitations of the Constitution."

Many other cases cited in the note above referred to are to the same point.

The logical result of the principle upon which special assessments are sustained would seem to require that they must be *in rem*. The subject of the assessment must have a permanent location in order to be benefited by a local improvement, and therefore must be land or some interest in it. It is not contended, nor can it be, that any specific parcel of the appellant's real estate, or interest therein, can or will be benefited.

If a valid award against the company, as held by the court below in the rejection of the instructions prayed on its behalf, it becomes not only its personal obligation, but the personal liability of its stockholders as well, its charter rendering them individually liable for all its debts and liabilities to an amount equal to the stock held by them (act of July 1, 1864, sec. 19).

It is plain from the act that Congress did not contemplate any such assessment against appellant as has been made.

FOURTH POINT.

Congress Had No Power Without the Assent of the Appellant to Require It to Extend Its Road.

This power is claimed under the right reserved in the charter to alter, amend, or repeal. But it is well settled

by the decisions of this and other courts that such power is not unlimited, and that the legislature can not, by virtue of it, take from the corporation any of its property, or, which would be the same thing, require it to make expenditures for the public good beyond the duties required of it in the original charter.

Shields *vs.* Ohio, 95 U. S. 319.
Miller *vs.* The State, 15 Wallace, 498.
Sinking Fund cases, 99 U. S. 700.
County of Santa Clara *vs.* Southern Pacific R. R. Co., 18 Fed. Rep. 385.
Lake Shore, etc., R. R. Co. *vs.* Smith, 173 U. S. 690.
St. Louis Iron Mountain, etc., *vs.* Paul, 173 U. S. 404.
Commonwealth *vs.* Essex County, 13 Gray, 239.
Commissioners, etc., *vs.* Holyoke Water Power Co., 104 Mass. 446.
Detroit *vs.* Detroit and Howell Plank Road Co., 43 Mich. 140.
Zabriskie *vs.* H. & N. Y. R. R. Co., 18 N. J. Eq. (3d C. E. Green), 178.
Miller *vs.* N. Y. & Erie R. R. Co., 31 Barb. 513.

In Shields *vs.* Ohio, this court said:

> "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."

And again, in the Sinking Fund cases, it was said by this court:

> "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit no one can doubt. All agree that it can not be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made."

In the case of the County of Santa Clara *vs.* The Southern Pacific R. R. Co., 18 Fed. Rep. 385, in the course of a lengthy opinion by Mr. Justice Field, it is said:

> "The State may, of course, accompany its grant with such conditions as it may deem proper for the management of the affairs of the corporation which do not impinge upon any provision of the Federal Constitution; and by the reservation clause it will retain control over the grant, and may withdraw it or modify it at pleasure. It is on this ground that the State has asserted a right to regulate the charges —the fares and freights—of corporations. But it is a novel doctrine that it can on that ground also control their property, appropriate it, burden it, and despoil them of it, as it may choose, unrestrained by any constitutional inhibitions. That doctrine has no standing as yet in the law of this country. The property acquired by corporations is held independently of any reserved power in their charters. By force of the reservation the State may alter, amend, or revoke what it grants; nothing more. It does not grant the tangible and visible property of the companies, their roads, their roadways, roadbeds, rails, or rolling stock. These are their creation or acquisition. Over them it can exercise only such power as may be exercised through its control of the franchises of the companies, and such as may be exercised over the property of natural persons engaged in similar business."

In the case of Com. *vs.* Essex Co., 13 Gray, 239, a statute authorizing said company to construct a dam across the Merrimac River and requiring it to construct and maintain efficient ways for the passage of fish, and subsequently, when said fishways proved insufficient, requiring the company to pay damages to those injured in their fisheries, which said company did, and afterwards a third act was passed requiring said company to construct efficient fishways, and it appeared that the cost thereof would be from $10,000 to $40,000, it was held that the last-mentioned act was invalid, not being authorized by the power to alter, amend, or repeal. In delivering the opinion of the court, Shaw, C. J., limits this power in the following language:

> "that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

In the case of Commissioners, etc., *vs.* Holyoke Water Power Co., 104 Mass. 446, Gray, J., in speaking of this power generally as to railroads, said:

> "Railroad corporations may be compelled, by general or special laws, to make changes in the level, grade, and surface of the roadbed, new structures at crossings of other railroads or of highways, or station-houses at particular places, in a manner, and to be enforced by forms of process, different from those provided for or contemplated by the original charter, or the general laws in force when that charter was granted,"

and refers in support thereof to the Massachusetts cases referred to in the opinion of the court below, except the one in 109 Massachusetts, which had not then been decided.

In the case of Detroit *vs.* Detroit and Howell Plank Road Co., 43 Mich. 140, it was held that, the company having constructed a road between two points in accordance with

its charter, the legislature under the power in question could not require it to abandon a portion of the road. Judge Cooley delivered the opinion of the court, and in commenting upon the cases cited by Chief Justice Alvey, in the opinion of the court below in this case to sustain the power in such cases, said:

> "There are cases in which amendments to charters having some resemblance to this have been sustained, but it is in general easy to distinguish them. Many of these are cited in the brief for the relator. Commissioners *vs.* Holyoke Co., 104 Mass. 446, in which a company having a dam across the Connecticut River was required to construct a fish-way, was a case involving a mere police regulation for the preservation of rights of others in the fishery above and below. All the following cases involved the same principle: Commonwealth *vs.* Eastern R. R. Co., 103 Mass. 254, where a railroad company was required to build a station-house and stop its trains at a certain locality; Albany, etc., R. R. Co. *vs.* Brownell, 24 N. Y. 345, in which it was held competent to require a railroad company to permit and provide for the crossing of its track by highways; Roxbury *vs.* Boston R. R. Co., 6 Cush. 424, in which a like question was involved; English *vs.* New Haven, etc., Co., 32 Conn. 240, in which a bridge, made necessary for the convenience of a railroad company, and used by the company and the public, was required to be made wider by the company; Worcester *vs.* Norwich, etc., R. R. Co., 109 Mass. 103, in which the railroads coming into a city were required to unite in a common passenger station at a point to be determined by commissioners; Meadow Dam Co. *vs.* Gray, 30 Me. 547, in which a company incorporated to build a dam across a river was required to construct a lock for purposes of navigation; and there are many others of the same sort."
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> "But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from a corporation any

> of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of Albany, etc., R. R. Co. *vs.* Brownell, 24 N. Y. 345, is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with provision for compensation."

Judge Cooley then refers to the case of Commissioners *vs.* Essex Co., *supra*, and some other cases as sustaining the same principle, and added:

> "What the State claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but spoliation.
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> "It may be that what the legislature of 1873 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property; and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall be to innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences."

In Zabriskie *vs.* The H. & N. Y. R. R. Co., 18 N. J. Eq. Rep. (3 C. E. Green), 178, the question arose upon a bill for an injunction by a stockholder against the undertaking by

the corporation of the extension of its road authorized by the legislature under the power to alter or amend, contained in the original charter. The court said:

> "Again, the power to alter or modify the act, and the true construction of this it held to be an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation, the right to take tolls or fare, or the amount to be taken. But the legislature had no right to impose upon the company any other duty or . . . thing involving any other duty, than that stated . . . the building a railroad from the Potomac river to Hackensack; anything in the manner of doing that they had the right to change. They could not oblige it to then and there all the meadows along the Hackensack, or to construct a canal, or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Boonton. They could do and oblige it to do no to the Franklin" (39 N. J. Eq., pp. 585-6).

In the case of Miller et New York & Erie R. R. Co., 21 Barb.(513) it was attempted under the power to alter or amend to require the company to bear the expense of laying out a street over the right of way and the necessary embankments, etc. The court said:

> "It is not material to inquire whether the legislature has a right to repeal the defendant's charter, unless it has been forfeited by the misconduct or neglect of its managers. It has not been repealed, and, until it shall be, the company is and will be protected by the Constitution in its rights of property" (21 Barb. 513).

In the case of the Lake Shore, etc., R. R. Co. v. Ohio, 173 U. S. 285, this court had under consideration the constitutionality of a statute of Michigan requiring railroad companies to keep an ash embankment and fence at certain rate good for two years. The court recognized in that

case the power of the legislature to make a reasonable regulation of rates, but held that the law in question was in excess of that, or any other constitutional power lodged in the legislature. Amongst the arguments of counsel in that case in favor of the power was that the legislature had the power of amendment, alteration, and repeal. Speaking upon this subject, at page 690, it is said by this court:

> "Assuming that the State is not controlled by contract between itself and the railroad company, the question is how far does the authority of the legislature extend in a case where it has the power of regulation, and also the right to amend, alter, or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers. It has no right even under such circumstances to take away or destroy the property or to annul the contracts of a railroad company with third persons (Greenwood *vs.* Freight Company, 105 U. S. 13, 17; Commonwealth *vs.* Essex County, 13 Gray, 238; People *vs.* O'Brien, 111 N. Y. 1, 52; Detroit *vs.* Detroit & Howland Plank-road, 43 Mich. 140).
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> "A railroad company, although a quasi public corporation, and although it operates a public highway (Cherokee Nation *vs.* Southern Kansas Railway, 135 U. S. 641; Lake Shore, etc., Railway *vs.* Ohio, 173 U. S. 285, 301), has nevertheless rights which the legislature can not take away without a violation of the Federal Constitution, as stated in Smyth *vs.* Ames, 169 U. S. 466, 544. A corporation is a person within the protection of the Fourteenth Amendment (Minneapolis & St. Louis Railway *vs.* Beckwith, 129 U. S. 26; Smyth *vs.* Ames, 169 U. S. 466, 522, 526). Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property."

Also on pages 697 and 698 it is said:

> "It is no answer to the objection to this legislation to say that the company has voluntarily sold thou-

sand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business, which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company.

"To say that the legislature has power to absolutely repeal the charter of the company and thus to terminate its legal existence does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the State over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts."

And again, on page 698, it is said:

"The power to enact legislation of this character can not be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend, or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means." . . .

It will be seen by reference to the foregoing authorities that the cases relied upon by the appellees and referred to by the Chief Justice of the Court of Appeals as sustaining the opinion of the court below upon this point are con-

sidered by Judge Cooley in his opinion in the case of Detroit *vs.* Detroit and Howell Plank Road Company, as proceeding upon a different principle, and referable rather to the exercise of the police power by the legislature than the reserved power of alteration and amendment; and the opinion of this court in the case of Lake Shore, etc., Railroad Co. *vs.* Smith, *supra*, refers to the Michigan case with approval, as well as other cases which make the same distinction. In the Michigan case it was held that the legislature, under this reserved power, could not require the corporation to shorten its road, because by so doing it decreased its revenue and thereby destroyed or took its property without compensation. If the legislature may not require the corporation to abandon the operation of a portion of its road, upon what principle can it require it to extend it, especially where it is apparent that the extension will involve heavy expense to the company without any certain adequate increase in its revenues therefrom.

In this connection attention is directed to the expression in Judge Cooley's opinion:

> "It may be that what the legislature of 1879 proposed to accomplish would in itself work no hardship to respondent and would be highly desirable to the city, but the principle violated is the fundamental principle that underlies all property;"

and to his further declaration that—

> "courts must look beyond the particular case to the governing principle and be governed by that, regardless of temporary and special inconveniences."

It would seem that the principle here declared is in harmony with the theory of all government that corporations, as well as persons, are to be judges of when and whether their capital shall be embarked in enterprises in which they

are not already engaged, and the question, under such circumstances, of whether the new undertaking would be an advantage or disadvantage to the corporation is not one which the legislature has the right to consider, or with which it has the power to deal.

It is submitted that it is apparent from the circumstances of this case, and from the length and nature of the extension to be made, that the appellant would certainly lose in the present and in the near and indefinite future by the undertaking. But, if the contrary were the fact, and the precedent be now established that Congress may require it to extend its road, it may at any time in the future be required to extend it to the District line, which might be absolutely destructive of its property.

The fact that on two prior occasions Congress has authorized and required this road to extend its line is referred to in the opinion of the court below. But that can not affect this case. It does not appear but that the appellant requested and desired those extensions. If it did not, and preferred to construct the extensions rather than to then raise the question of the power of Congress to require it, its having done so could not in any way affect any of its rights. Nor can the fact that it has, since this assessment was made, extended its road in accordance with the act of Congress, affect the question. It may well have preferred such course rather than to have become involved in any conflict with Congress which might have arisen over its refusal to do so. If the part of the act requiring it to extend its road is invalid, it follows that the part authorizing the assessment is equally so, and the extending of the road could in no way validate the assessment. In this connection the declaration of this court upon the point and to the above effect, hereinbefore quoted from the opinion in the case of the Lake Shore, etc., vs. Smith, is referred to, as well as the declaration therein contained that the power of the

legislature absolutely to repeal the charter can not and does not broaden or affect its powers under the reservation to alter and amend.

It is respectfully submitted that no questions arise in this case as to the power of Congress upon the subject of general taxation of corporations, or its right of regulation, referable to the exercise of the police power, and that the act in question is in excess of the power of Congress under the reservation of the right to alter and amend the charter, and is, therefore, invalid and constitutes no authority for the assessment against it.

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